91-1057

Supreme Court, U.S.
FILED
DEC 26 1991
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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

COLIE FOXWORTH,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
To The Eighth District
Court of Appeals
For Cuyahoga County, Ohio

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THE SUPREME COURT OF OHIO

1991 TERM

To wit: October 23, 1991

State of Ohio,	:	
Appellee,	:	**Case No. 91-1446**
v.	:	**E N T R Y**
Colie Foxworth,	:	
Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 58702)

THOMAS J. MOYER
Chief Justice

APPENDIX "A"

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 58702

STATE OF OHIO	:	
	:	
Plaintiff-appellee:		
	:	**JOURNAL ENTRY**
-vs-	:	**AND OPINION**
	:	
COLIE FOXWORTH	:	
	:	
Defendant-appellant:		
DATE OF ANNOUNCEMENT OF DECISION	:	**MAY 30, 1991**
CHARACTER OF PROCEEDING:		**Appeal from Cuyahoga Cty. Court of Common Pleas Criminal Division Case No. CR-240099**
JUDGMENT		**:AFFIRMED AND REMANDED :FOR RESENTENCING**
DATE OF JOURNALIZATION:		_____
APPEARANCES	:	

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Cuyahoga Cty. Pros.	**Attorney for**
KARL WETZEL, ASST.	**Appellant**
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APPENDIX "B"

J.F. CORRIGAN, J.,

Appellant Colie Foxworth appeals from his convictions for possession of cocaine, possession of criminal tools, preparing to ship or transport cocaine, and permitting a motor vehicle to be used in the commission of a felony drug abuse offense. For the reasons set forth below, appellant's convictions are affirmed, and this case is remanded for proper resentencing.

I.

Appellant was indicted by the Cuyahoga County Grand Jury on July 3, 1989 for the following: Count One, possession of cocaine in violation of R.C. 2925.03, with the specification that the amount exceeded three times the bulk amount; Count Two, permitting a motor vehicle to be used in the commission of a felony drug offense in

violation of R.C. 2925.13; Count Three, preparing to ship or transport cocaine in violation of R.C. 2925.03 with the specification that appellant had reasonable knowledge it was intended for sale or resale by him or another; Count Four, possession of criminal tools in violation of R.C. 2923.24. These charges stem from appellant's arrest by members of the Cleveland Police Department on May 27, 1989. Appellant motioned to suppress all evidence found in connection with the state's case, which motion was denied. The matter proceeded to jury trial on September 25, 1989. The jury found appellant guilty of all charges on September 28, 1989.

At the suppression hearing, the state presented the testimony of Detective Michael Caroselli of the narcotics unit of the Cleveland Police Department. Detective Caroselli

testified that on May 27, 1989, one of the officers in the narcotics unit fielded a phone call from an anonymous female, who advised the police that Colie Foxworth would be delivering cocaine to the vicinity of East 125th Street and Superior between 7:00 and 7:30 p.m., and that he would be driving a silver-grey Cadillac with license plate number 739EXP. Detective Caroselli met with Sergeant Gercar to discuss the handling of this situation. Caroselli, Gercar, and Detective White proceeded to an area near East 125th and Superior, arriving at approximately 6:50 p.m.

Detective Caroselli further testified that at 7:15 p.m. the officers spotted a vehicle that matched the description and license plate given them, which vehicle was proceeding toward East 125th and Superior. The officers then attempted

to stop the suspect vehicle, but traffic conditions did not allow them to reach it until it had traveled a few hundred feet and parked at a gas station at East 125th and Superior. The officers maintained visual contact with the car and driver, and finally encountered the driver, now a pedestrian, approximately fifty feet from the parked vehicle.

Detective Caroselli testified that at this point the officers stopped the suspect and asked for identification. The suspect produced identification indicating that he was Colie Foxworth, appellant herein.

Detective Caroselli then asked appellant which car he was driving, but appellant denied that he had been driving a car. Detective Caroselli, noting that appellant had a set of car keys in his hand, informed appellant that the police officers had witnessed

him driving the silver-grey Cadillac. To this appellant responded by handing his keys to the police and stating, "I'm clean, you can check the car if you want". Detective Caroselli and Sergeant Gercar proceeded to search appellant's vehicle. Officer Caroselli finally testified that a search of the vehicle uncovered a Nintendo video game box containing a bag with a large amount of cocaine in it, and a digital pager. Appellant was subsequently placed under arrest. A search incident to that arrest uncovered $200 in cash.

Appellant testified that he was driving the silver-grey Cadillac in the area that evening, but did not travel along the route indicated by police. He further testified that he parked the car to use a pay phone. While he was walking to the phone, appellant was stopped by an

unidentified white male. This lone white male proceeded to throw appellant against the hood of a car, search his pockets and take his car keys. This lone white male then handcuffed appellant, put him in the rear of his unmarked vehicle, where another black male sat handcuffed, and then searched appellant's car. Appellant testified that this lone white male never identified himself as a police officer. Finally, appellant denied ever consenting to a search of his vehicle, and asserts that he was arrested immediately upon being stopped.

The trial court denied appellant's motion to suppress and the matter proceeded to trial. For its case the state presented the testimony of Detective Michael Caroselli, Sergeant Raymond Gercar and Detective Michael White.

At trial, Detective Caroselli gave essentially the same testimony as he related at the suppression hearing, with the exception that, he was not permitted to testify as to the details of the anonymous tip. Upon cross-examination, however, Detective Caroselli was asked questions about any notes he may have taken in relation to appellant's arrest. Prior to dismissing Detective Caroselli from the witness stand, the trial judge continued that line of questioning. Detective Caroselli testified that he had notes containing the year, make, color, and license plate number of appellant's car prior to apprehending appellant and that those notes were incorporated into his police report and discarded. The trial judge instructed the jury not to consider any information in Detective Caroselli's notes as substantive proof

of the elements of the crime. .

Finally, Detective Caroselli testified that while still on the crime scene, a digital pager, which had been confiscated from appellant, activated displaying a phone number. Detective White placed a call to that number. White's testimony concerning these events follows below.

Sergeant Raymond Gercar's testimony was [consistent] with that of Detective Caroselli. In addition, Sergeant Gercar testified that it was he who recovered the digital pager from the front seat of appellant's vehicle.

Detective White's testimony paralleled that of Caroselli and Gercar with regard to the investigation, observation and subsequent apprehension of appellant. In addition, Detective White testified that while the officers were at the

crime scene, a digital pager that had been confiscated from appellant activated, displaying a telephone number. Detective White called that telephone number and spoke with a women named Eileen. Several questions concerning Detective White's conversation with Eileen were asked and objected to on hearsay ground. Detective White was eventually permitted to state that it was his understanding from the conversation with Eileen that she wished to purchase drugs.

Appellant's trial testimony did not vary from that given at the suppression hearing. Appellant restated that he was arrested and searched by a lone police officer, and that he did not consent to a search of his vehicle.

II.

For his first assignment of error

appellant argues that the trial court erred in denying his motion to suppress.

Appellant asserts that the evidence seized by the police officers was the fruit of an investigative stop that was not conducted within the parameters of Terry v. Ohio (1968), 392 U.S. 1. Appellant's contention is that the anonymous tip received by the police was not sufficient to create a "reasonable suspicion" that criminal activity was afoot.

In Terry, supra the Supreme Court stated that in order to justify an investigatory stop of an individual "the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts reasonably warrant that intrusion." Terry, supra at 21. The court must look at the "totality of the

circumstances" in determining whether the intrusion was lawful. Illinois v. Gates (1983), 462 U.S. 213. In a recent Supreme court case, Alabama v. White (1990), __ U.S. __, 110 S. Ct. 2412, these tests have been applied to a case involving an anonymous call received by the police.

In White, the police received an anonymous telephone tip that one Vanessa White would be leaving a particular apartment, at a particular time, in a particular vehicle, and would be transporting drugs to a particular motel. The police immediately proceeded to the apartment building and spotted the suspect car. They then waited and witnessed White leave the apartment building, enter the suspect car, and drive the most direct route to the motel mentioned by the tipster. The police stopped White's vehicle shortly before

arriving at the motel. White consented to a search of the vehicle, which search uncovered a quantity of cocaine. The Supreme Court found that the information received from the anonymous tipster, as corroborated by the independent police work of observing White leave the specified apartment at the specified time, and drive a specified car to a specified location, "exhibited sufficient indicia of reliability to justify the investigatory stop ***". White, supra, at 2417.

The facts in the case sub judice parallel those in the White case. The police received an anonymous tip that appellant would be driving a silver grey-cadillac, license number 739EXP near East 125th and Superior between 7:00 and 7:30 p.m. This information was corroborated by the police as they spotted appellant's vehicle and

followed it to East 125th and Superior, where appellant voluntarily parked. Appellant then consented to a police search of his vehicle.

On the basis of the Supreme Court's holding in White, we find that the trial court properly overruled appellant's motion to suppress.

Appellant's first assignment of error is overruled.

III.

For his second assignment of error, appellant argues that the trial court erred when it allowed the jury to consider certain hearsay testimony as substantive proof of appellant's guilt.

Appellant points to two separate instances at trial to form the basis of this assignment. First, appellant contends that Detective Caroselli's testimony about receiving an anonymous tip, and the subsequent testimony

about his notes, were inadmissible hearsay. The second instance of purported hearsay being used as substantive proof of guilt arose when Detective White was questioned about a phone conversation with "Eileen".

Appellant's first claim, concerning testimony about an anonymous tip, is not well founded. In order for Detective Caroselli's testimony to have been hearsay, it must have been offered "to prove the truth of the matter asserted." Evid. R. 810(C). As it was stated in the record, this testimony was offered to explain the subsequent investigative activities of the police.

> "It is well established that extrajudicial statements made by an out-of-court declarant are properly admissible to explain the actions of a witness to whom the statement was directed. See United States v. Zamarripa (C.A. 8, 1976), 544 F. 2d 978, 982, certiorari denied, 429 U.S. 1111; State v. Lopez (1957),

182 Kan. 46, 51-2, 318 P. 2d 662, 666."
State v. Thomas (1980), 61 Ohio St. 2d 223, 232.

Detective Caroselli's testimony was properly admitted for this purpose.

Appellant's pre-trial motion in limine, however, prevented Detective Caroselli from testifying as to the nature and extent of the anonymous information. During cross-examination, however, appellant's counsel asked Detective Caroselli several questions about notes that he had with him in the police car prior to encountering appellant. These questions formed the basis for the court's later questions about the content of these notes. Detective Caroselli finally testified that he had notes with him that contained "the year, make, color and license plate number of the car." After Detective Caroselli was questioned further by both parties, the trial judge

instructed the jury not to consider any information Detective Caroselli had in his notes substantive proof of the elements of the crime for which the appellant was accused. Appellant's claim that this information was used as substantive proof of his guilt is not well founded.

Appellant's second claim is that Detective White's testimony concerning a phone call he made to an "Eileen". At trial the court stated that this evidence was admissible under Evid. R. 901(B)(6). Evid. R. 901(B)(6) allows for evidence of a telephone conversation to be admitted where there is some authentication that the person answering the call is the person called. Here, the authentication of "Eileen" is not at issue, hence, Evid. R. 901(B)(6) does not apply.

The admission of Detective White's testimony was not error, because Detective White did not recount his conversation with "Eileen", but merely stated that it was his understanding from the conversation that she wished to purchase drugs.

Appellant's second assignment of error is overruled.

IV.

For his third assignment of error, appellant argues that his Rule 29 motion for acquittal should have been granted, as the evidence proffered was insufficient as a matter of law to support the guilty verdicts.

A motion for judgment of acquittal is governed by Crim. R. 29(A), which provides:

> "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one

> or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

A court shall not grant an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven beyond a reasonable doubt. State v. Bridgeman (1978), 55 Ohio St. 2d 261, syllabus. Further, the evidence is to be viewed in a light most favorable to the government. Cincinnati v. Robben (1982), 8 Ohio App. 3d 203, 204.

Appellant contends that his motion for judgment of acquittal should have been granted because the state was unable to prove the "knowingly" aspect of the crime of possession under R.C. 2925.03.

"Possession" is defined in R.C. 2925.01(L) as follows:

> "(L) 'Possess' or 'possession' means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

Thus, possession may be actual or constructive. State v. Haynes (1971), 25 Ohio St. 2d 264, 269-270. To establish constructive possession, the state must demonstrate that the defendant was able to exercise dominion or control over the prohibited item. State v. Wolery (1976), 46 Ohio St. 2d 316, 332. Further, where one is found to be the driver of a vehicle in which contraband is found in the trunk, it can be established that the driver was in constructive possession of the contraband. State v. Vorsteg (July

19, 1982), Montgomery App. No. 7562, unreported.

In this case, the state established that the vehicle was registered in the name of appellant's deceased father, but was also registered under appellant's birth date and social security number. Further, the state established that appellant was driving the vehicle just prior to the search, and police opened the trunk with keys furnished by appellant.

Appellant testified that he regularly uses the vehicle, but that several other people use it as well.

The credibility and weight of witnesses testimony being within the province of the jury in this case, State v. Dehass (1967), 10 Ohio St. 2d 230, we find that reasonable minds could reach different conclusions as to whether the elements of the crime

charged were proven.

Appellant's third assignment of error is overruled.

V.

For his fourth assignment of error, appellant argues that the sentence imposed exceeds that authorized by the Revised Code.

Under count I of the jury verdict, appellant was found guilty of possession of cocaine in an amount exceeding three times the bulk amount, a second degree felony. The sentence for this crime is three years actual incarceration. Appellant was sentenced to eight years actual incarceration under Count I.

We find that appellant's fourth assignment of error is well taken.

Furthermore, the court's journal entry improperly states the crimes that appellant was found guilty of committing. Count one, except for the

prison sentence, is correct. Under Count II, appellant was found guilty of violating R.C. 2925.03(A)(2), a third degree felony, and not R.C. 2923.24. The sentence imposed for Count two is, however, proper. Unded Count III, appellant was found guilty of violating R.C. 2925.13, a first degree misdemeanor, not R.C. 2925.03. The sentence imposed for Count III is, however, proper. The conviction and sentence under Count IV are properly journalized.

Judgment affirmed and remanded for proper resentencing.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

BLANCHE KRUPANSKY, C.J., and

ANN McMANAMON, J., CONCUR

_____

JUDGE
JOHN F. CORRIGAN

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

TRIAL COURT'S RULING ON THE MOTION TO SUPPRESS

* * *

The Court has heard the evidence on the motion to suppress all evidence in the case before the evidence, State versus Colie Foxworth, and the Court, in viewing the evidence, of course, must determine, among other things, the credibility and believability of each witness that testifies in this particular case, and in so doing, must weigh the interest that each person has in the outcome of my verdict today.

Also, the Court would take into consideration the fact, the manner the way in which questions were asked and answered.

Now, the demeanor of the individuals, whether there's inconsistencies or consistencies in their testimony. We have two

different people testifying two different ways in this case. We have Detective Caroselli and we have the defendant Mr. Foxworth testifying as to different things, but it would appear in this case that the issue here for the Court, as set forth in a recent case, is what the Court has to do in this particular case in evaluating the validity of the stop.

I must consider the totality of the circumstances and the whole picture as set forth in United States versus Cortez, 449 U.S. 411. And in so doing, I have to evaluate the evidence, and the Court finds that in this particular case, that the Cleveland Police Department received a telephone call from an anonymous tipster, a female, on the date involved, that is May 27th, 1989.

Obviously, it was on the second shift. That wasn't testified to.

They alleged that this arrest occurred between seven and 7:30. And the tipster described a silver gray Cadillac and provided a license plate.

The tipster also gave an area of East 125th and Superior. If I was listening carefully, the tipster further indicated that it was Colie Foxworth that would be driving the car. Really, Jimmy saved me a little time. The Court sees a lot of comparisons to an old case, Draper versus United States, 358 U.S. 307, a 1959 case where they indicated there was probable cause in that particular case.

And, of course, as the prosecutor rightly turns out that are -- we only have the reasonable suspicion in this particular case as the comparison. And frankly this is -- the difference really in this particular case, the fact that the -- they didn't know the

man's name in that case. In this case they knew it was Colie Foxworth.

And in the case of Draper, the Draper case, also the information came from Chicago and was used in Denver, and I think it was the FBI in that case, came out and the man was walking fast and carrying the suitcase.

In this particular case the police officer were sitting at first, East 105th and Superior, and then he's corrected by Caroselli that they were at Lakeview and Superior and they observed the exact car, a silver gray Cadillac.

They observed there was a male driving it and they observed that the license plates were exactly the same, and they proceeded to follow this car. They followed the car, went a few blocks, and it went into a gas station.

The Court would indicate that

under the totality of the circumstances, under both Gates, as well as other cases, that the police officers had every right in the world, in fact, they had a duty under the factual situation in this case to follow that car and ascertain whether or not it was engaged in any specific conduct to lead them to have a reasonable suspicion that the individual, that is Foxworth, at the time was engaging in criminal activity.

The Court, under Terry, would indicate that the police can stop and briefly detain a person for investigatory purposes if they have a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if they lack probable cause under if Fourth Amendment.

That is the basis, first basis of

this type of a search. And the Court would indicate also, that even a minimum level of justification may go for the stop. That is something more than under a particularized suspicion or a hunch -- it would have to be a little more than that, but less than the levels of suspicion required for probable cause.

That is the criteria that we have between the two different types. The Court would indicate that under the totality of the circumstances that the Fourth Amendment was not violated and the Fifth wasn't violated, nor were any amendments of the high constitution under the Fourteenth Amendment.

The totality of the circumstances must be evaluated by me as Judge to determine the probability, rather than a certainty of criminal conduct. This is again the United States versus

Cortez.

So the Court would indicate that the officers, and I believe the officers -- I would have to say that ahead of time. I don't think they were lying. I don't think they conjured up this particular story.

I believe the testimony was that the officer himself had the license plates and the make of the car, the color of the car, when he was sitting there at Lakeview and Superior.

The Court would indicate that the behavior as to what happened after the defendant was walking down the street -- there is a strict complete difference in the behavior.

One side indicates that he got out of the car and asked certain questions. Among those questions were -- I might say as to the -- before I get into this, as to the original informant's tip, and what actually

occurred on the street, also confirmed under the totality of the circumstances, was the fact that someone would be one person driving. I left that have out.

And the Court would indicate that first and foremost, Sergeant Gercar pulled over and stopped the vehicle, over the center line about 50 feet away from the car. They had observed the defendant stop his car in the gas station, lock it, and walk away from it.

He jumped out and he asked for identification -- asked the defendant to produce identification which the defendant did.

And then the question was, were you driving a car? I do believe that was the question. The answer was that he denied driving the car, although he had the keys in his hand and they could see it.

He then later immediately thereafter, he admitted that he was driving the car and the car was his -- I'm sure looking towards the parking lot where he had left it. And then further, the police officer said they did not put him under arrest at this point -- at any time. They were making an [investigatory] arrest based on the circumstances, the totality of the circumstances that they knew themselves at that moment which had been conveyed to them through the anonymous tipster.

He said, I'm clean. You can check the car if you want to, and he handed over the keys.

Now, this goes to the second element of this thing, and that is whether it was at his consent or not.

Now, the Court would indicate that in this particular case, the Court would base its finding here, not

only on Terry, but on United States versus Andrasocolov, a Supreme Court case that came out, April 3, 1989, cited in the brief of the defendant.

Now, the District Court of Appeals said -- and that particular Court of Appeals, didn't say what the Supreme Court said. And the Supreme Court in that case indicated in a similar case to this, wherein a police officer, even in the absence of probable cause, may stop and briefly detain the person for investigative purposes, based on the officer's reasonable suspicion supported by articulable facts that criminal activities were afoot.

Now, in this case we have -- I'm not going to repeat it. They had the facts given to them. They won't be police officers if they didn't stop that car. They should be up on charges and fired if they didn't.

And the Andrasocolov case, what occurred there is that a man arrived in Honolulu, Hawaii and the agents grabbed the traveler by the arm and moved the traveler back onto the sidewalk at the time when the agents, one of whom later testified, that the traveler's behavior altered -- classic aspects of a drug carrier.

They knew, among other facts, that previously the traveler had bought two round trip tickets from a roll of twenties -- they knew at that time.

[They] knew he travelled under a name that did not match his own name and under which his telephone was listed. He traveled under the name of Bracket, I think was the name. He used another name.

And further, that he had an original destination of Miami, an alleged source of illicit drugs. He

stayed over in Miami after leaving Honolulu for 48 hours and after a flight to Honolulu from Miami. He appeared nervous during his trip. And he checked his luggage.

These are the facets that this Court -- and incidentally, this is what's different than ours, that after obtaining warrants, the agency found cocaine in the traveler's carry-on bag.

The traveler was indicted for federal drug offense, the United States District Court denying the traveler's motion to suppress the cocaine and other evidence seized from the luggage.

The Court expressed a view that the agents of the DEA had reasonable suspicion that the traveler was involved in drug [trafficking] when they stopped him at the airport.

In this particular case, I say

likewise, they had reasonable suspicion to stop this man and question him even though he was thirty feet away from the car. The traveler entered a conditional plea of guilty which had the affect of the traveler's right to change the District Court's ruling on the Fourth Amendment.

On appeal the United States District Court of Appeals from the Ninth Circuit initially expressed the view that the agent did not have reasonable and articulable facts to stop him; two, that the agent's seizure of the traveler violated the Fourth Amendment and all evidence acquired had been suppressed.

The traveler had been permitted to withdraw his guilty plea and later on, even though the Court of Appeals violated its initial position, the Court also denied the Federal government's petition for rehearing

and the amended opinion still reversed the traveler's conviction under somewhat different reasoning.

The purpose of the Fourth Amendment reasonable suspicion must be founded upon evidence , outgoing criminal behavior, and, two, even though probalistic evidence attempts to identify an individual as a type of person who may engage in criminal enterprises, based on theory or tips, as the drug courier's appearance or behavior may serve to confirm or deny such behavior evidence.

Probalistic [evidence] is insufficient to create a reasonable suspicion, and under this test the government had not demonstrated that the agents had a reasonable suspicion that the [traveler] was engaged in a criminal enterprise at the time the agents stopped the traveler, and this, of course, I'm talking about the Court

of Appeals.

This is the argument of Jim Willis' brief. Now, the Supreme Court reversed the Judgment of the Court of Appeals and remanded the case for further hearings.

In the opinion it was held, one, in determining the purpose of the Fourth Amendment, the police officer had reasonable suspicion to stop and briefly detain a person for investigation.

The Court must consider the totality of the circumstances of the whole picture. This Court has, especially this 500 and some grams of cocaine. Thus, it's inappropriate to divide the evidence into -- this is very important as far as the arguments are concerned and the argument of the brief.

To divide the evidence into, evidence on one ongoing criminal

behavior on one end, and probalistic evidence on the other, even if a stop occurred, for Fourth Amendment purposes when the DEA agents move the traveler back on the sidewalk, the agents, on these facts, have a reasonable basis to suspect that the traveler was engaged in transferring illegal drugs.

Because even though any one of the factors known to the [agent] was not of self-proof of any illegal conduct and wasn't consistent with the innocence of the traveler. All of the factors taken together amounted to reasonable suspicion.

And the Court in this case, as so far as the argument as first put forward, finds that there is, in this particular case, reasonable suspicion -- more than the minimal level of objective justification.

In fact, it was almost probable

cause in the mind of this Court, that relates to the stop and seizure.

Now, we have another indication here of another reason why it should be overruled. The Court heard two stories, and again, one of the stories by the police officer has indicated that the defendant said, I'm clean. You can check the car if you want to.

And then the police officers said the defendant handed the keys over to me. Now, the defendant has a different story all together. What is impossible about it, is that we have to believe that the policeman is a liar and he's telling the truth.

And first of all, he didn't know the time of day it occurred. I'm sure that the police reports would show, and, in fact -- strike that.

That the police procedure would show that it occurred sometime around seven o'clock at night to eight

o'clock, in the area in which the tipsters indicated that this man, by name, would be located with 500.85 grams, and she said a kilo. That is less than the kilo.

I have to decide who's telling the truth, once again, as it relates to the consent.

The Court would have to consider, among other things, again the veracity of the witnesses, and a lawful, valid consent search is a waiver of a person's right under the Fourth Amendment to be searched -- only on the authority of a valid search warrant. Usually you have to have a search warrant.

The Court would indicate that his background tells him that one's right against self-incrimination is similar to these elements to declare a consent.

The general rule concerning a

consent, the person must fully understand the nature of the consent and that he's waiving his Constitutional right under the Fourth Amendment, and that consent must be freely and voluntarily given.

And the burden of that is on the prosecution at this hearing to establish that any purported consent to search was understandable, freely and voluntarily given and that the consent was specific and absolutely clear, and in addition, the prosecutor must establish that the consent was obtained from the right person.

Well, in this particular case, the man said it was his car. He was operating the car.

He indicated that he was clean. He indicated that he was clean, and was asked by the police officers, and said he gave his voluntarily consent by saying the words.

I'll have to get the exact words here. I'm clean. You can check the car, if you want to, and he handed over the keys to the automobile.

The Court would indicate that based upon the testimony, that he understood what they were going to do. He gave -- he understood that he could give consent. He freely and voluntarily gave consent and that the words are specific and absolutely clear that this man was the person consenting to the search [of] his own car the one he was operating.

So the Court would indicate that the State of Ohio has brought forth evidence here. There is no coercion from what I have heard as to the State's version of this particular case as it relates to freely giving the consent.

And he was the right person to give it, and the Court doesn't believe

for one moment that this man didn't think these were police officers that he was talking to.

For these reasons, the Court is going to overrule, and should be clear -- I should write this, but I don't have the time.

From the testimony before this Court, the policemen had received consent which was knowingly and reasonably given to them by this defendant and actual searching of the vehicle was by consent.

There is no arrest. No arrest had been made up to that point the Court finds. The Court finds that the defendant was standing with Detective White, I believe was the testimony, outside his car, and with that -- for these reasons, I'm going to overrule the motion to suppress. So ordered.

MONDAY AFTERNOON SESSION, SEPTEMBER 5, 1989 ARGUMENTS OF COUNSEL AND RULI NG MADE ON DEFENDANT'S MOTION IN LIMINE

THE COURT: The Court will recognize James Willis' motion in limine.

MR. WILLIS: Your Honor, there are two things, one, the defendant has been convicted, previously convicted of a [misdemeanor], a slight drug offense for possession of some marijuana which was found in the bar itself.

And he was convicted of that and I'm concerned that the State not make any efforts to utilize that directly or indirectly by way of impeachment or suggesting that it's relevant to anything that happened in this case.

Number two, the officer has testified and we have no way of knowing this, that there was an anonymous caller that triggered the arrest of the defendant.

THE COURT: You had no way -- I do. I believe him for one.

MR. WILLIS: I have no way of knowing this. And my motion indicates that I did not know what triggered the arrest of the defendant. I thought they just saw him coming down the street and they usually do and stop him because he's suspicious.

Nonetheless, I'm concerned by any testimony by these officers that they received any information from an anonymous caller that said that Colie Foxworth would be driving in that particular area.

That is the reason why they stopped him. I think all that would be prejudicial to the defendant because it's obvious hearsay and double hearsay coming from Detective Caroselli.

THE COURT: He was in the room when the call was made and --

MR. WILLIS: He didn't talk to the caller.

THE COURT: I understand that.

MR. WILLIS: It would be double hearsay if he attempted to say that.

THE COURT: That's true, but in the other hearing he could say it. In the last hearing he could say it.

MR. WILLIS: Yes. I'm not objecting to it. He certainly is, certainly permitted to rely on hearsay provided it's reliable.

I'm concerned that nothing like that come to the attention of this court. It's not admissible for any purpose with reference to the charges made in the indictment and I'm asking the Court to expressly admonish the prosecutor to advise his witnesses not to tell us anything about what his callers may have told him, to stop Mr. Foxworth.

THE COURT: Mr. prosecutor,

please?

THE WETZEL: Your Honor, in regards to the motion in limine as to the admonition ... of the detectives that testify to the fact that it was an anonymous call and what was said in the call, one, there is nothing to prevent them from testifying that an anonymous phone call was made.

I would agree with Mr. Willis to a certain extent. They cannot translate what was said in that anonymous call verbatim, however they are able to testify, that based on this anonymous phone call they then proceeded to such and such location.

And based upon that, they can then tell what the results of their arrest were. No way should they be inhibited from saying that.

The only thing they can possibly be limited on is exactly what the phone caller said in their tip and

that would be all.

As to the defendant's prior conviction, it's a [misdemeanor]. I would agree it cannot be used to impeach him because it's a [misdemeanor].

THE COURT: The Court will grant the motion in limine and as it regards the matter that he had been convicted earlier of a [misdemeanor], and where counsel has reason to believe that the State --

An expected witness that will make certain improper statements, properly sought this Court to restrain any reference directly or indirectly to the specific subject of the misdemeanor. And he also indicates it as to the specific subject of the informant -- anonymous informant.

And the Court, until it's first shown to be material and relevant, of course, the Court already heard this

in the preliminary motion. The motion is properly made at the proper time.

Now, the Court will, since, it's not a final appealable order, the Court would indicate that the precautionary request as to the misdemeanor will be given to you right now and you can tell your officers about it.

And the Court would indicate that it's going to limit the exact words that came over the telephone, being hearsay on hearsay, is his exact fear, but the Court will note that the Cleveland Police Department received that complaint and upon receipt of that complaint certain actions -- I won't do that.

It's apparent and I don't think it is in grave danger of being reversed and because of that reason -- but I'll entertain any objections and arguments on that particular issue at

the side-bar when it comes up with regard to how to police got out there and the way they got there.

This is only a tentative ruling anyway. Until the propriety of such motion is made during the evidence part of this case, I'm going to withhold any order to the prosecutor concerning the actions of the police upon receiving a complaint from one of its citizens, so therefore, I'm half and half on the second one.

MR. WILLIS: Thank you.

THE COURT: I am unable to determine the propriety of this particular motion ahead of time and will not be able to determine it until we reach an evidentiary stage of this case. That's what I --

MR. WILLIS: I take it that the prosecutor won't make reference to it in his opening statement?

THE COURT: He will not.

MR. WILLIS: Will not.

THE COURT: Upon a complaint -- I'm not going to stop him about the fact that they got a complaint, Jimmy, no way. I don't think he can refer to an anonymous tip that he is going to be at such and such place and time and such and such a place --

MR. WILLIS: I understand.

THE COURT: To that reference, you're correct, but to the fact there was a complaint -- Okay. Let's call the jury in.

MR. WILLIS: I note my exception to that.

THE COURT: You may note your exception.

MR. WILLIS: Thank you.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix To Petition For Writ Of Certiorari was mailed to the office of Stephanie Tubbs-Jones, Cuyahoga County Prosecutor, 1200 Ontario Street, Cleveland, Ohio 44113, on this ___ day of _____, 1991.

_____
JAMES R. WILLIS, ESQ.
Attorney for Petitioner